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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

NO. 83-

MICHAEL WAYNE EVANS,

Petitioner,

versus

THE STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Petitioner prays that a Writ of Certiorari Issue to review the Judgment of the Court of Criminal Appeals of the State of Texas, entered May 25, 1983, and the Denial of Petitioner's Motion for Permission to File a Motion for Rehearing entered on September 21, 1983. The Court of Criminal Appeals of the State of Texas further Stayed the Issuance of its Mandate for Thirty (30) days.

On October 31, 1983, Associate Justice LOUIS F. POWELL, JR. of the Supreme Court of the United States of America, entered an Order staying Petitioner's Execution pending Petitioner's Petition for Writ of Certiorari. On November 21, 1983, Justice LOUIS F. POWELL, JR. signed an Order Extending the Time for Filing a Petition for Writ of Certiorari in No. A-387, MICHAEL WAYNE EVANS versus THE STATE OF TEXAS.

CITATION TO OPINION BELOW

The Opinion of the Texas Court of Criminal Appeals is reported at 656 S.W. 2d 65 (Tex. Cr. App. 1983) and is attached hereto as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 USC Section 1257(3), Petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTION PRESENTED

1. Whether the Trial Judge materially erred in denying Petitioner's Motion to Quash The Indictment Because of Systematic Exclusion of Classes From the General Venire in violation of Petitioner's Fourteenth Amendment Rights as Guaranteed by the Constitution of the United States.

2. Whether the Trial Judge materially erred in denying and failing to sustain Petitioner's Motion to Quash The Indictment, as prayed for in his Motions, because of the Systematic Exclusion of Negroes, Mexican Americans and persons between the age of Eighteen and Twenty-one years from serving as Grand Jurors in Dallas County, Texas.

3. Whether the Trial Court materially erred in excluding evidence from the Petitioner as to Petitioner's final conviction for murder in a separate case and the punishment received i.e., a life sentence, therein under Article 37.071 of the Texas Code of Criminal Procedure that would allow the Jury to hear and consider evidence of Petitioner's conviction and life sentence for said murder conviction for the purpose of mitigation on the punishment of death pursuant to Article 37.071 of the Texas Code of Criminal Procedure in violation of the Petitioner's Fourteenth Amendment Right to Due Process and Equal Protection.

4. Whether the Trial Court erred in allowing the State to introduce into evidence the final conviction of the Petitioner in another case during the Guilt-Innocence phase of the trial, but not allowing the Jury to hear and consider the punishment assessed the Petitioner in that same case during the punishment phase of the trial in violation of the Petitioner's Fourteenth Amendment Right to Due Process of Law and Equal Protection of the Law as Guaranteed by the Fourteenth Amendment to the Constitution of the United States.

5. Whether the Trial Court erred in refusing to allow evidence sought to be presented by the Petitioner concerning the convictions and sentences received by a co-defendant, Earl Stanley Smith, in the same cause, and involving the same facts on which the Petitioner was being tried for, under Article 37.071 of the Texas Code of Criminal Procedure, and said denial being violative of the Petitioner's Fourteenth Amendment Due Process of Law and Equal Protection Rights as Guaranteed by the Constitution of the United States.

6. Whether the Trial Court materially erred in not Quashing the Indictment Returned against the Petitioner in this case because the Jury Selection System operated to exclude from service as Grand Jury Commissioners an identifiable class of citizens of eligible Jurors in the community, to-wit: Negroes, Mexican-Americans and 18 to 21 year olds, in violation of the Sixth and Fouteenth Amendments to the United States Constitution guaranteed to an impartial Jury.

7. Whether the Trial Court materially erred in not Quashing the Indictment Returned against the Petitioner in this case because the Jury Selection System operated to exclude from service as Grand Jurors an identifiable class of citizens of eligible Jurors in the community, to-wit: Negroes, Mexican Americans and 18 to 21 year olds, in violation of the Sixth and Fourteenth Amendments to the United States Constitution guaranteed to an impartial Jury.

8. Whether the Trial Court erred in overruling Petitioner's Offer of Proof pertaining to Earl Stanley Smith's convictions and sentences growing out of the same transactions that Petitioner was on trial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Texas Law:

A. Article 37.071 of the Texas Code of Criminal Procedure. Procedure in Capital Cases.

a. Upon a finding that the Defendant is guilty of a capital offense, the Court shall conduct a separate sentencing proceeding to determine whether the Defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the Trial Court before the Trial Jury as soon as practical. In the proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The State and the Defendant or his counsel shall be permitted to present arguments for or against sentence of death.

b. On conclusion of the presentation of the evidence, the Court shall submit the following Issues to the Jury:

1. Whether the conduct of the Defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

2. Whether there is a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

3. If raised by the evidence, whether the conduct of the Defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

c. The State must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

d. The Court shall charge the jury that:

1. It may not answer any issue "yes" unless it agrees unanimously; and

2. It may not answer any issue "no" unless 10 or more jurors agree.

e. If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the Defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

f. The judgment of conviction and sentence of death shall be subject to automative review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not exceeding 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals

B. Article 19.01 of the Texas Code of Criminal Procedure. Procedure for Appointment of Grand Jury Commissioners.

a. The District Judge, at or during any term of Court, shall appoint not less than three, nor more than five persons to perform the duties of Jury Commissioners, and shall cause

the sheriff to notify them of their appointment, and when and where they are to appear. The District Judge shall, in the order appointing such Commissioners, designate whether such Commissioners shall serve during the term at which selected or for the next succeeding term. Such Commissioners shall receive as compensation for each day or part thereof they may serve the sum of Ten Dollars, and they shall possess the following qualifications:

1. Be intelligent citizens of the county and able to read and write the English language;
2. Be qualified Jurors in the county;
3. Have no suit in said Court which requires intervention of a Jury;
4. Be residents of different portions of the county; and
5. The same person shall not act as Jury Commissioner more than once in the same year.

b. In lieu of the selection of prospective Jurors by means of a Jury Commission, the District Judge may direct that 20 to 50 prospective Grand Jurors be selected and summoned, with return on summons, in the same manner as for the selection and summons of panels for the trial of civil cases in the District Courts. The Judge shall try the qualifications for and excuses from service as a Grand Juror and impanel the completed Grand Jury in the same manner as provided for Grand Jurors selected by a Jury Commission.

C. Article 38.28 of the Texas Code of Criminal Procedure. Procedure Attacking Testimony of His Own Witness.

A party may, when testimony of his own witness is injurious to his cause, attack the testimony in any other manner except by offering evidence of the witness' bad character.

STATEMENT

By an Indictment filed on July 9, 1977, MICHAEL WAYNE EVANS was charged with murdering Elvira Guerrero, on or about the 26th day of June, 1977, in the course of a robbery. He entered a plea of Not Guilty. The Petitioner, MICHAEL WAYNE EVANS, was initially tried in October of 1977 in the 203rd Judicial District Court of Dallas County, Texas, for this offense of Capital Murder, as charged in the Indictment. The Petitioner was convicted of Capital Murder and sentenced to die during this initial trial. Pursuant to Article 37.071 of the Texas Code of Criminal Procedure, the Petitioner's conviction received automative review from the Texas Court of Criminal Appeals. The Texas Court of Criminal Appeals Reversed this cause and Remanded same to the Trial Court for a New Trial consistent with its Opinion.

Petitioner, MICHAEL WAYNE EVANS, was tried a second time, September 25 - October 8, 1981, in the 203rd Judicial District Court of Dallas County, Texas for the offense of Capital Murder, as charged in the Indictment. He was again convicted of Capital Murder and sentenced to die. On October 31, 1983, the Order of Execution and enforcement of the sentence of death imposed upon the Petitioner was stayed by Associate Justice, LOUIS F. POWELL, JR. of the Supreme Court of the United States of America, after the Texas Court of Criminal Appeals had affirmed Petitioner's conviction and denied Petitioner's Motion for Permission to File a Motion for Rehearing. The constitutional questions, hereinabove and now presented arise from the following, to-wit:

A. Exclusion of Negroes, Mexican-Americans and persons between the age of Eighteen and Twenty-one years from serving as Grand Jury Commissioners.

The Petitioner had filed Motions which were Numbered 3, 7 and 39, requesting the Trial Judge to Sustain his Motion to Quash The Indictment Because of The Systematic Exclusion of Negroes, Mexican-Americans and persons between the age of Eighteen and Twenty-one years from serving as Grand Jury Commissioners in Dallas County, Texas. An Evidentiary Hearing was held on Motion Numbers 3, 7 and 39, and it conclusively showed that the Criminal District Judges in Dallas County, Texas, had systematically excluded Negroes, Mexican-Americans and persons between the age of Eighteen and Twenty-one years, from serving as Grand Jury Commissioners. The evidence was further uncontradicted that no District Judge had complied with Article 19.01 of the Texas Code of Criminal Procedure. The evidence adduced at the Evidentiary Hearing was conclusive that no qualified person between the age of Eighteen and Twenty-one years had ever been appointed, and none had been sought by the Criminal District Judges in Dallas County, Texas to serve as Grand Jury Commissioners.

The Trial Court allowed the Petitioner to adopt the Evidentiary Hearing held in this case during the first trial of this Petitioner concerning Motions 3, 7 and 39, and made a part of the record for the purposes of these Motions and the State of Texas entered into the stipulation which was accepted by the Court.

The Criminal District Judges in Dallas County testified concerning the Courts that they presided over, the manner in which they went about selecting persons to serve as Grand Jury Commissioners, instructions that they gave to the Grand Jury Commissioners, and the procedure that was followed by the Grand Jury Commissioners in submitting names to the District Judges for persons to serve on the Grand Jury. The Criminal District Judges' testimony was that they picked people that they personally

knew, a couple called upon persons in the community that they may know, to furnish them with the names of persons to serve as Grand Jury Commissioners. However, the prevailing practice for the Criminal District Judges was to select whomever he wanted to. The evidence was uncontradicted that a majority of the District Judges had never appointed a Negro, a Mexican-American or a person between the age of Eighteen and Twenty-one years to serve as a Grand Jury Commissioner. There was also some Criminal District Judges who had never instructed the Grand Jury Commissioners to seek out persons in accordance with Article 19.01 of the Texas Code of Criminal Procedure, who may have the required qualifications to serve on the Grand Jury, and particularly persons between the age of Eighteen and Twenty-one years of age. All of the District Judges testified, and it was undisputed by the State, that there were many able and qualified Negroes, Mexican-Americans and persons between the age of Eighteen and Twenty-one years in Dallas County, Texas, who were qualified to serve as Grand Jury Commissioners.

The evidence further demonstrated that at no time had more than two Negroes ever sat on a Grand Jury, at the same time, from 1968 up to the date of the time of Petitioner's trial in 1977. The evidence showed that the greatest number of Negro persons, who, had at one time, ever sat on a Grand Jury at the same time was two (2). There were many terms of the Grand Jury when there were no Mexican-Americans and no Negro members of the Grand Jury at all.

It was conclusive and uncontradicted that no person whatsoever between the ages of Eighteen and Twenty-one years of age had ever served on a Dallas County Grand Jury from 1968 up to the date of the hearing of Petitioner's Motion.

The witness, L.A. BEDFORD, JR., a Municipal Court Judge for the City of Dallas, and a practicing Attorney in Dallas County, Texas for more than thirty (30) years, testified that he was the first Black Grand Jury Commissioner appointed by a District Judge in Dallas County, Texas, and that was five (5) or six (6) years after the Trial Judge in the instant case had been appointed

a District Judge in October of 1968. This would have meant, that it was either 1973 or 1974 before the first Negro Grand Jury Commissioner was ever appointed. Judge Bedford testified that for the first eighteen (18) to twenty (20) years during his courthouse experience in Dallas County, he had never heard of or seen a Negro serving as a Grand Jury Commissioner.

B. Exclusion of Negroes from serving on the Grand Jury.

The Petitioner offered Exhibits which were attached as Court Exhibit Number One to the hearing on Motion Numbers 3, 7 and 39. These Exhibits clearly demonstrated the exclusion of Negroes, Mexican-Americans and persons between the age of Eighteen and Twenty-one years from serving as members of the Dallas County Grand Jury for the years 1968 to 1977. The evidence further revealed that out of the persons on the Grand Jury that indicted the Petitioner herein, there were no Negro persons or persons between the ages of Eighteen and Twenty-one years.

C. The Court Refused to Permit the Petitioner to Inquire of Prior Convictions of Co-Defendant, Earl Stanley Smith.

On or about August 20, 1981, Petitioner filed a Motion to Issue a Bench Warrant for Earl Stanley Smith. The witness Smith was brought back from the Texas Department of Corrections, based upon Petitioner's request. During the Jackson v. Deno hearing, Earl Stanley Smith, with his attorney present, was called as a witness by the Petitioner, outside the presence of the Jury. The witness was examined concerning his being arrested, conversations between the Petitioner and himself while they were in the Dallas County Jail and what was said between them. No questions were asked Smith by Petitioner's counsel concerning the facts of the purported crime, for which Petitioner was on trial, although the witness Smith testified that he had signed a statement on the first day he was arrested.

The State filed a Motion in Limine to prohibit the Petitioner from going into or making it known to the Jury in any form or

fashion, the sentence that the witness Smith received, and particularly, that he received a Life Sentence. The Court upon a request for a point of clarafication from Petitioner's counsel stated, that he would not prevent them from "proving that he (Smith) was convicted, or that he plead guilty", but under their Motion, they just simply filed a motion not to go into punishment proceedings. Still outside the presence of the Jury, the State's counsel then asked: "Well, if this is going to be their witness we object and make a Motion in Limine by any attempt by Defendant's defense counsel to impeach Earl Stanley Smith for not only his conviction for this offense, but any conviction whatsoever of Earl Stanley Smith, because it would be attempted impeachment of their own witness. We would object to it and make a motion that before they do that, that there be a hearing outside the presence of the jury to determine the admissibility of such, because that is obvious impeachment." There was some discussion between counsel and the Court concerning the basis of the Motion in Limine, whether it was based on materiality and relevancy, or had been extended to include impeachment. The Court gave counsel for the State time to present any authority in support of its Motion in Limine.

Still outside the presence of the Jury, while Earl Stanley Smith was present in Court, the State was asked to restate its Motion on the record so that it might be clear as to what the basis of the State's Motion in Limine was. Counsel for the State requested that the "defense counsel be limited, if Earl Stanley Smith be called, that defense counsel not be allowed to elicit from him any prior convictions of Earl Stanley Smith while he is on the stand, and that they not be allowed to go into the facts of Earl Stanley Smith having been convicted of this offense for which the Petitioner is presently on trial, that the sentence that Earl Stanley Smith received for this offense for which the Defendant, Michael Wayne Evans, is presently on trial, not be solicited." Petitioner contended that that he had "a right to inquire of Earl Stanley Smith, if called, concerning any prior record that he may or may not have, date

of the offense, case number, court and the sentence, if any, assessed, just as he would with respect to any other information or background information, such as his name, age, address where he lived, how long he lived there, where he worked, etc., and to restrict or not allow the Petitioner to ask such information, in light of the fact that said witness, in that the said Earl Stanley Smith may give testimony injurious to his cause, and under the provisions of Article 38.28 of the Code of Criminal Procedure, he would have the right to inquire of this type of information from the said Earl Stanley Smith." After some comment, the Court stated, "In Light of Ramirez v. State, 543 S.W. 2d 631, the Court is going to grant the State's Motion in Limine and prohibit the Defendant from impeaching his own witness by asking him about prior felony convictions, and the Court is also going to sustain the State's Motion and prohibit you from going into whether or not the Defendant has been convicted of the offense from which the Defendant is on trial, and also what sentence he received."

After the State had rested, and in the presence of the Jury, Petitioner called Earl Stanley Smith as a witness. Counsel for Petitioner inquired of the witness Smith concerning his name, age, present address, acquaintanceship with the Petitioner and other parties who testified, whether he was arrested and concerning a meeting between the Petitioner and the witness Smith while in the Dallas City Jail. No questions were asked Smith by the Petitioner's counsel about the facts of the offense, how they were committed, when, etc. Thereafter, on cross-examination by counsel for the State, facts and details surrounding the abduction, transportation and subsequent murder of two Mexicans in a field were solicited.

After a conference with the Court, Petitioner's counsel then inquired of the witness Smith concerning what he stated the facts were surrounding the murder of the people in the field. Matters which had not been gone into direct examination, but were opened up through the cross-examination by counsel for the State.

After a recess was called and the Jury was retired for lunch, a hearing was held outside the presence of the Jury. During this recess, Petitioner made an Offer of Proof as to what he would prove concerning the witness Earl Stanley Smith's prior criminal record. Thereafter, Petitioner put on evidence in defense of his case, and then rested subject to the Court's ruling concerning the Offer of Proof made as to Earl Stanley Smith.

On October 5, 1981, the Court made its ruling with respect to the Offer of Proof of the Petitioner concerning admissibility of the prior conviction of the witness Earl Stanley Smith. After certain remarks, the Court granted the State's Motion and denied the Petitioner's Motion to Submit the Offer of Proof to the Jury.

D. The Court Allowed the State to Introduce a Final Conviction for the Offense of Murder but Refused to Allow the Petitioner to Present Evidence that the Petitioner Received Life Imprisonment for said Murder.

After the Jury had found the Petitioner guilty of Capital Murder, as Charged in the Indictment, and during the punishment phase of the trial, and after the State had rested, the State filed a Motion in Limine to prevent the Petitioner or his counsel from presenting any evidence that might indicate or refer to the fact that the Petitioner had received a life sentence regarding the death of David Lee Potts, a case for which the Petitioner was tried for after he had received the death penalty in this particular case in 1977, and that the case was on appeal at the time of the trial. The Petitioner's position was that he was entitled to offer this evidence in accordance with Article 37.071 of the Texas Code of Criminal Procedure. Further, the Petitioner contended that it was essential that the Jury have before it all possible relevant information about the individual Petitioner whose fate it was to determine, and that to disallow the testimony requested by the Petitioner concerning the fact that the Petitioner had received a life sentence in the very case that the State was

allowed to introduce into evidence facts about the Petitioner, would deny the Jury to have before it all the relevant information about the Petitioner, MICHAEL WAYNE EVANS. The Court, after argument of counsel, permitted the State to introduce into evidence testimony concerning the fact that the Petitioner was convicted of Murder in Cause Number F77-6513-KP, styled The State of Texas v. Michael Wayne Evans, which cause number related to the death of David Potts. The Court in allowing the State to present the testimony of the fact of the conviction and not of the sentence of life received for said conviction, reasoned that the fact concerning the punishment received by the Petitioner was not relevant, material and admissible under the statutory and case law as it existed at that time.

E. The Court Refused to Allow the Jury to Consider The Fact that Petitioner Received a Life Sentence for Another Murder for the Purpose of Mitigation on the Issue of Punishment Pursuant to Article 37.071.

The Petitioner's challenges to the questions propounded hereinabove were rejected by the Texas Court of Criminal Appeals, in its original Opinion and the Court's denial of Petitioner's Motion to File a Motion for Rehearing, and his conviction and the Death Sentence was Affirmed.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In his brief before the Texas Court of Criminal Appeals and his Application for a Rehearing addressed to that Court, Petitioner contended that Negroes, Mexican-Americans, and persons between the age of Eighteen and Twenty-one years had been systematically excluded from serving as Grand Jury Commissioners in Dallas County, Texas. That Negroes, Mexican Americans and persons between the ages of Eighteen and Twenty-one years had been systematically excluded from serving on the Grand

Jury and that no more than two (2) Negroes had ever served on the Grand Jury at any time from 1968 up to the date that the Petitioner was indicted in this cause by the Dallas County Grand Jury in 1977.

The Court erred in refusing to Quash the Indictment Returned by the Grand Jury against the Petitioner in that the Grand Jury impaneled by the State was from a Venire made up contrary to requirements of the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Court's refusal to permit the Petitioner to inquire into prior convictions of co-defendant, Earl Stanley Smith, prevented the Jury from receiving all evidence that may tend to mitigate against the punishment of death; the Court erred in excluding evidence from the Petitioner as to Petitioner's conviction for a prior murder, and a subsequent life sentence, therein preventing the Jury from considering facts that may tend to mitigate against the punishment of death under Article 37.071 and in violation of the Petitioner's Fourteenth Amendment Rights to Due Process and Equal Protection; and that the Court erred in allowing the State to present evidence of the fact that the Defendant had a prior conviction for murder, but disallowing the Petitioner from presenting evidence on his own behalf that he received a life sentence for said murder conviction in violation of the Petitioner's Fourteenth Amendment Rights to Due Process and Equal Protection. The Court of Criminal Appeals rejected these contentions in affirming his conviction and sentence, and denying the Petitioner's Application for Rehearing.

REASONS FOR GRANTING THE WRIT

1. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER ARTICLE 19.01 OF THE TEXAS CODE OF CRIMINAL PROCEDURE AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WAS VIOLATED BY THE INTENTIONAL AND SYSTEMATIC EXCLUSION OF NEGROES, MEXICAN-AMERICANS AND PERSONS BETWEEN THE AGE OF EIGHTEEN AND TWENTY-ONE YEARS FROM SERVING AS GRAND JURY COMMISSIONERS IN DALLAS COUNTY, TEXAS ON ACCOUNT OF THEIR RACE AND COLOR OR THEIR AGE.

One of the issues raised by the Petitioner in the Trial Court and before the Court of Criminal Appeals of the State of Texas, was that Petitioner's rights had been violated because of the failure of the Judge of the 203rd Judicial District Court, at or during any time of Court, failed to comply with Article 19.01 of the Texas Code of Criminal Procedure. Petitioner contended and contends before this Court that the Criminal District Judges had failed to appoint Negroes, Mexican-Americans and persons between the age of Eighteen and Twenty-one years, and that the Petitioner was convicted of the offense of Capital Murder, and has been denied "Equal Protection Under the Law" by the intentional and systematic exclusion of Negroes, Mexican Americans and persons between the age of Eighteen and Twenty-one years from serving as Grand Jury Commissioners in Dallas County, Texas. The evidence was particularly clear concerning persons serving as Grand Jury Commissioners (the persons who actually selected the persons that would serve on the Grand Jury) that returned the indictment against the Petitioner herein. Petitioner contended that persons were selected by Grand Jury Commissioners solely on account of their race and color, and this constituted a violation of the Fourteenth Amendment of the United States Constitution, which prohibits racial discrimination in the selection of Grand Jury Commissioners and of Grand Jurors. Smith v. State, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84 (1940).

The Petitioner submits that the evidence was clear in the case that the procedure followed by the Criminal District Judges of Dallas County, Texas, at the time that the indictment was returned against him herein, did not comply with Article 19.01 of the Texas Code of Criminal Procedure and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The Criminal District Judges, failed to comply with Article 19.01 in the selection of Grand Jury Commissioners in that they failed to choose persons who were residents of different portions of the County, did not choose qualified,

intelligent persons who had no suit in any court which would require the intervention of a jury, were able to read and write the English language, who were members of the Negro race or Mexican-Americans, or who were persons between the age of Eighteen and Twenty-one years. The Petitioner was a young man between the age of Eighteen and Twenty-one years. The record in this case reflects that no District Judge had ever appointed a person between the age of Eighteen and Twenty-one years, and that the Criminal District Judges had not even sought to obtain persons who were between the age of Eighteen and Twenty-one years to serve as Grand Jury Commissioners.

The evidence was conclusive that the Criminal District Judges did not seek to obtain persons from different portions of the County, but sought in most instances, their personal acquaintances who resided in the same area that the Criminal District Judges doing the appointing did. It was also clear that Negroes and Mexican-American persons who were qualified under the provisions of Article 19.01 were not actively sought by the Criminal District Judges for a long period of time, and that it was only within the last five (5) or six (6) years before 1977, as disclosed by the record, that any attempt was made to seek a qualified person of the Negro or Mexican-American race. Petitioner submits that because of the failure to appoint qualified Negroes and Mexican-American persons and persons between the age of Eighteen and Twenty-one years, his constitutional rights were violated in the selection of the Grand Jury Commissioners and the Grand Jury Members who were appointed by the Grand Jury Commissioners, who returned the indictment against the Petitioner in this case. The Petitioner had a constitutional right to have an indictment returned by a Grand Jury chosen by Grand Jury Commissioners where there was no evidence of discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Because of the method used by the Criminal District Judges in selecting

Grand Jury Commissioners, this claim of constitutionality and lack of discrimination cannot be said to exist, and therefore a clear violation of both the Texas Code of Criminal Procedure and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution were violated. The evidence in this case showed a long and continuous exclusion of Negroes, Mexican-Americans and persons between the age of Eighteen and Twenty-one years from serving as Grand Jury Commissioners on the grounds of racial discrimination and/or age discrimination in Dallas County, Texas.

2. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER OR NOT PETITIONER'S RIGHTS WERE VIOLATED BY THE EXCLUSION OF NEGROES FROM SERVING ON THE GRAND JURY, WHICH VIOLATED THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The record was clear in this case that at no time had more than two (2) Negroes ever sat on a Grand Jury, at the same time, from 1968 up until the date that the Petitioner was indicted. The evidence showed that the greatest number of Negro persons who at one time had ever sat as Grand Jury Commissioners in Dallas County were two (2). Many terms of the Grand Jury of Dallas County when there no Mexican-Americans and no Negro members on the Grand Jury at all. The evidence was conclusive and uncontradicted that no persons between the age of Eighteen and Twenty-one years had ever served on a Dallas County Grand Jury from 1968, up to and including the date that the Petitioner was indicted. Petitioner was a person within the age range of Eighteen to Twenty-one years. Because of this long and continuous exclusion of persons between the age of Eighteen and Twenty-one years, of all races, and of Negro and Mexican-American persons from serving on the Grand Jury in Dallas County, Texas, same constituted racial discrimination within the meaning of the Fourteenth Amendment of the United States Constitution. Since

same constituted racial discrimination in violation of the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment of the United States Constitution, Petitioner's Motion to Quash the Indictment returned against him for the offense of Capital Murder should have been quashed, for the reasons stated in said Motion, and for violation of the Constitutional Rights Guaranteed to the Petitioner herein. Stoker v. State, 331 S.W. 2d 310 (1960). This Court has held that racial discrimination within the meaning of the Fourteenth Amendment and the Selection of a Grand Jury renders void an indictment returned by such a body. Norris v. State of Alabama, 94 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074; Cassell v. State of Texas, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839; Hill v. State, 144 Tex. Cr. 415, 157 S.W. 2d 639, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559; Smith v. State, 136 S.W. 2d 842, 147 S.W. 2d 118, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 884; Patton v. State of Mississippi, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76; Eubanks v. State of Louisiana, 36 U.S. 587, 78 S.Ct. 970, 2 L.Ed. 2d 991.

The decisions hereinabove cited of this Court were and are binding upon the Court of Criminal Appeals of the State of Texas, and were binding upon the Trial Court in this matter. The Trial Court's duty in the instant case, because of the racial discrimination in the selection of the Grand Jury, was to declare the indictment void because of said racial discrimination. Stoker v. State, supra, p. 311. The evidence was conclusively shown that there was a violation of the Fourteenth Amendment of the United States Constitution by the racial discrimination referred to in the selection of the members of the Grand Jury that returned the indictment of the Petitioner herein. The Record was replete from each of the District Judges, who testified, that they had made no specific, special or affirmative effort to assure that each group of Grand Jury Commissioners appointed by said Judges included Negroes, Mexican-Americans or persons between the age of Eighteen and Twenty-one years. Therefore, Petitioner submits that he established a prima facie case of systematic exclusion

of Negroes, Mexican-Americans and persons between the age of Eighteen and Twenty-one years, from serving on the Grand Jury over a prolonged period of time, and this constituted and established a prima facie case of discriminatory purpose and/or discriminatory effect.

The Law requires that once Petitioner had established such a prima facie case, that the burden automatically shifts to the State to rebut same. The Record in this case was abundantly clear that the State of Texas did not attempt to adduce any evidence whatsoever to rebut the prima facie case established by the Petitioner herein. Thus, the Trial Court and the Court of Criminal Appeals in affirming said Trial Court committed reversible error in not applying the test set out in Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272 (1977). Therefore, based upon the evidence adduced by the Petitioner during the pre-trial stage and hearings upon his Motions, the applicable law, both under the Texas Constitution and the United States Constitution and cases interpreting same, the Petitioner respectfully submits that his constitutional rights were violated, and therefore this Petition for Writ of Certiorari should be granted to consider same.

3. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT ERRED IN REFUSING TO PERMIT THE PETITIONER TO INQUIRE INTO PRIOR CONVICTIONS OF A CO-DEFENDANT GROWING OUT OF THE SAME FACTS AS WERE ALLEGED IN THE INDICTMENT AGAINST PETITIONER WHEN SAID PRIOR CONVICTIONS OF THE CO-DEFENDANT WOULD BE USED TO TEST THE CREDIBILITY OF THE CO-DEFENDANT'S DAMAGING TESTIMONY IN VIOLATION OF THE PETITIONER'S FIFTH AND FOURTEENTH AMENDMENTS DUE PROCESS AND EQUAL PROTECTION RIGHTS AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES.

The Petitioner called co-defendant, Earl Stanley Smith, as his witness. The Petitioner was instructed by the Court to limit the area of inquiry of this witness, same being permitted by the Court pursuant to a request by the State through its Motion in Limine, to restrict the Defendant from inquiring into

certain matters deemed irrelevant by the State. The Petitioner restricted his direct inquiry of co-defendant Earl Stanley Smith pursuant to the directives of the Court, and passed same witness for cross-examination. The State, however, inquired into areas not covered on direct by the Petitioner and solicited testimony concerning the facts and circumstances surrounding the case that both the Petitioner, and co-defendant had been indicted for. The testimony of this co-defendant, as solicited by the State of Texas, was damaging to the case of the Petitioner.

The Petitioner in an effort to test the credibility of co-defendant Earl Stanley Smith's testimony, sought to impeach said testimony of Earl Stanley Smith by introducing into evidence the prior criminal record or prior convictions of Earl Stanley Smith. It was Petitioner's contention that the State, by soliciting testimony damaging to the Petitioner, had in effect adopted Earl Stanley Smith as its witness, thus vouching for his testimony.

The Court, after considering the arguments of Petitioner and that of the State of Texas, sustained the State's request to prevent the Petitioner from introducing into evidence the prior criminal convictions and/or prior criminal records of co-defendant Earl Stanley Smith, deeming same as irrelevant and immaterial to the cause, and in addition that the Petitioner was in effect impeaching his own witness.

Petitioner contended that the refusal of the Trial Court to allow the Petitioner to offer into evidence, evidence of prior criminal record of a co-defendant, specially in view of the fact that the Petitioner was restricted in his area of inquiry of this co-defendant, and that the damaging testimony of the co-defendant only came out because of questioning from the State, denied the Petitioner fundamental fairness and Due Process as Guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The Petitioner contended then to the Court of Criminal Appeals as it does now to this Court, that the principal as laid down in Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed. 297, 93 S.Ct. 1034, as the controlling case on this point.

The Trial Court reasoned that the Petitioner by calling the co-defendant as his own witness was in essence vouching for the testimony of said witness. Petitioner further contends that once the State had gone into the matter under the provisions of Article 38.28, the Texas Code of Criminal Procedure, had a right to inquire of the witness Smith the matters excluded from evidence, to establish or disestablish credibility. The failure on the part of the Trial Court and the affirmance of the Trial Court's ruling by the Court of Criminal Appeals, constituted fundamental unfairness to the Petitioner.

The Petitioner respectfully submits that the failure on the part of the Trial Court and the Texas Court of Criminal Appeals to permit impeachment of a witness giving damaging testimony to the Petitioner constituted fundamental unfairness, thus violated the Petitioner's constitutional rights and therefore this Petition for Writ of Certiorari should be granted to consider same.

4. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT ERRED IN DENYING THE PETITIONER'S REQUEST TO PUT INTO EVIDENCE THE FACT THAT THE PETITIONER HAD BEEN CONVICTED AND SENTENCED TO A TERM OF LIFE IMPRISONMENT AND WHETHER THIS DENIAL PREVENTED THE JURY FROM RECEIVING EVIDENCE THAT MAY TEND TO MITIGATE AGAINST THE PUNISHMENT OF DEATH, THUS VIOLATING THE PETITIONER'S RIGHTS TO FOURTEENTH AMENDMENT DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES.

The Petitioner had been convicted of the offense of Murder, a First Degree Felony, in Cause No. F77-6513-P in the 203rd Judicial District Court of Dallas County, Texas wherein he was convicted of the death of David Lee Potts. The Jury sentenced the Defendant in that cause to a term of imprisonment for life.

At the time that the Petitioner was tried for the offense of Capital Murder, the conviction was a final conviction and the Petitioner was serving said term of imprisonment.

After the Jury had found the Petitioner guilty of Capital Murder as Charged in the Indictment in the case at bar, and during the punishment phase of the Capital Murder Trial, and after the State had rested, the State filed a Motion in Limine to instruct the Petitioner or Petitioner's counsel not to mention or any way allude to any sentence that Petitioner might have received regarding the death of David Lee Potts in Cause Number F77-6513-P.

The Petitioner opposed said Motion in Limine arguing that pursuant to Article 37.071 of the Texas Code of Criminal Procedure, that the Petitioner was entitled to offer any evidence that would tend to mitigate against the punishment of death just as the State was entitled to offer any evidence that they desired to offer that would tend to support their contention for the penalty of death.

The Petitioner argued and directed the Court's attention to several cases alleging that it was essential that the Jury have before it all possible relevant information about the Petitioner whose fate it must determine, and in this case would deny the Jury to have all such relevant information about Petitioner whose fate it was about to determine.

The Court, after considering the arguments of the State and of the Petitioner, sustained and granted the State's Motion in Limine preventing the Petitioner, Petitioner's counsel or any witnesses called by the Petitioner from relating to the Jury any facts concerning David Lee Potts and the sentence that the Petitioner received for the Murder of David Lee Potts.

The State previously during the innocence and guilty phase of the trial had made it known to the Jury that the Petitioner had been charged with the offense of murder concerning David Lee Potts, and thus this information was already before the Jury.

The Petitioner contends that under Article 37.071(a) of the Texas Code of Criminal Procedure, that evidence may be presented as to any matter that the Court deems relevant to the sentence. The failure on the part of the Court to permit the Petitioner from offering evidence as to the final conviction by the Petitioner constituted reversible error. The Petitioner urged to the Court the decision of this Court in the case of Jurek v. State, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed. 2nd at 929, a 1976 case wherein this Court discussed the Jury Question under 37.071 and significantly stated that, "What is essential is that the Jury has before it all relevant information about the individual whose fate it must determine." The Petitioner contends and submits to the Court that the fact that the Petitioner had received a life sentence was relevant to all three (3) issues. Accordingly, the Petitioner contends that it was improper for the Court to prevent and disallow evidence concerning the fact that the Petitioner had a final conviction for murder and a sentence of life for same. Accordingly, this Court should grant Petitioner's Writ of Certiorari to consider the question as to whether or not Petitioner's Fifth and Fourteenth Amendment Rights to Due Process of Law and Equal Protection as Guaranteed by the Constitution of the United States were violated.

5. THE TEXAS COURT OF CRIMINAL APPEALS FAILED TO CONDUCT A PROPORTIONALITY REVIEW OF PETITIONER'S SENTENCE TO INSURE THAT THE SENTENCE IS NOT DISPROPORTIONATE TO SENTENCES IMPOSED IN SIMILAR CASES, THEREBY VIOLATING PETITIONER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The Petitioner contends and asserts that Texas, through the Texas Court of Criminal Appeals, does not on a regular basis undertake a review of all Capital Murder cases and compare the facts and circumstances in said cases with the sentences imposed upon other Capital Murder Cases, and particularly as same relates

to the facts and circumstances of the Petitioner in the case at bar. The Petitioner recognizes that the Texas Court of Criminal Appeals has on occasions since 1975 on a random basis, conducted a Cursory Review but that said Review was not done in the present case. Therefore, Petitioner's Eighth and Fourteenth Amendment Rights have been and were abridged by the Court's failure to conduct such a Review.

The Petitioner asserts here that the Texas Court of Criminal Appeals should conduct such a Review to ascertain whether or not the penalty assessed in this case is proportionate to other sentences imposed for similar cases. The Petitioner asserts that such a Review should be done in the case of a co-defendant. It is particularly interesting at this point to note that the Texas Court of Criminal Appeals failed to and reasoned against such a Review in the case of co-defendant Earl Stanley Smith, who was indicted for Capital Murder in three (3) cases, and as it relates to the fact that the co-defendant Earl Stanley Smith was involved in similar cases, and the fact that his culpability in the murder of the deceased persons was no less than that of the Petitioner. The fact that co-defendant Earl Stanley Smith was instrumental and as culpable in the murder of the deceased, as shown by the Record in this case, would tend to indicate that the State acts arbitrarily and capriciously, when it decides which Defendant it chooses to seek the Death Penalty against. It is undisputed that the co-defendant Earl Stanley Smith received, through plea bargaining, three (3) sentences of Life imprisonment for the same offenses, as Petitioner was tried and convicted, and the Texas Court of Criminal Appeals in rejecting the Petitioner's Grounds of Error on this point, reasoned that the Petitioner's acts and culpability must stand on its own and is irrelevant as to whether or not what sentence the co-defendant, Earl Stanley Smith received in his cases.

Clearly, this constitutes a violation of Rights Guaranteed to the Petitioner by the Eighth and Fourteenth Amendments to the United States Constitution. The same would be true in reviewing Records which would show that although persons were indicted for Capital Murder, they were never tried for same.

6. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER OR NOT THE DEATH PENALTY AS APPLIED IN THE STATE OF TEXAS CONSTITUTES DISCRIMINATION ON ACCOUNT OF RACE, AND VIOLATES PETITIONER'S FOURTEENTH AMENDMENT RIGHTS TO EQUAL PROTECTION OF THE LAW.

Petitioner contends that more Blacks and Hispanics are prosecuted and convicted of Capital Murder than Caucasians. This practice on the part of the State of Texas, constitutes Racial Discrimination because of Race. Petitioner is Black and because of the application of Texas Capital Murder Statutes on him in this case, constitutes a violation of his Fourteenth Amendment Rights to Equal Protection of the Law.

C O N C L U S I O N

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

E. Brice Cunningham

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ATTORNEYS FOR PETITIONER

PROOF OF SERVICE

I, Walter L. Irvin, am one of the Attorneys for Petitioner herein, a member of the Bar of the Supreme Court of the United States, certify that a copy of Petitioner's Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas has been mailed to the following parties: Attorney General Jim Mattox, Supreme Court Building, P. O. Box 12548, Austin, Texas; Assistant District Attorney, Appellate Section, District Attorney's Office, New Dallas County Courthouse Building, Dallas, Texas 75202; Honorable Thomas B. Thorpe, Judge 203rd Judicial District Court, New Dallas County Courthouse, Dallas, Texas 75202, by depositing a copy of same addressed to each of them, by United States Mail, postage prepaid, on this the 19th day of December, 1983.

Walter L Irvin
WALTER L. IRVIN

STATE OF TEXAS I

COUNTY OF DALLAS I

A F F I D A V I T

BEFORE ME, the undersigned, a Notary Public in and for the State of Texas, County of Dallas, on this day personally appeared WALTER L. IRVIN, who, after being duly sworn, deposed as follows:

My name is WALTER L. IRVIN. I am one of the Attorneys for Petitioner, MICHAEL WAYNE EVANS.

I am a member of the Bar of the Supreme Court of the United States. I certify that Petitioner's Motion for Leave to Proceed in Forma Pauperis and Petitioner's Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas attached thereto was placed in the United States Postal Service, Express Mail, on the 19th day of December, 1983.

Walter L. Irvin
WALTER L. IRVIN

SUBSCRIBED AND SWORN TO BEFORE ME, the said Notary Public, on this the 19th day of December, 1983, to certify which witness my hand and seal of office.

Flora J. McGowan
NOTARY PUBLIC, STATE OF TEXAS

NOTARY PUBLIC STATE OF TEXAS
FLORA J. McGOWAN
Notary Public, State of Texas
My Commission Expires Dec. 31, 1984

Michael Wayne EVANS, Appellant,

v.

The STATE of Texas, Appellee.

No. 68914.

Court of Criminal Appeals of Texas, En Banc.

May 25, 1983.

Rehearing Denied Sept. 21, 1983.

Defendant was convicted in the 203rd Judicial District Court, Dallas County, Thomas B. Thorpe, J., of capital murder. Defendant appealed. The Court of Criminal Appeals, Odom, J., held that: (1) in view of article restricting impeachment of one's own witness, defendant after cross-examination of defense witness by the State on matters assertedly foreign to direct examination was not entitled to impeach such witness by showing his prior convictions, and (2) proof of prior convictions of witness who was codefendant was not within right to present mitigating circumstances to jury at punishment stage.

Affirmed.

Teague and Miller, JJ., concurred in result.

Onion, P.J., and Clinton, J., dissented.

1. Criminal Law ⇐13.2

Statutory requirements for admission of confessions, where not yet in force at time of confession, did not apply. Vernon's Ann.Texas C.C.P. art. 38.22.

2. Criminal Law ⇐1120(1)

Where defendant's contention on review that officer to whom defendant gave oral statement was not aware of fact that defendant had previously been given *Miranda* warnings by two other officers was contradicted by the record, no error was presented. Vernon's Ann.Texas C.C.P. art. 38.22.

3. Grand Jury ⇐2½, 7

To show underrepresentation of race in composition of grand jury and grand jury commissioners, it is essential that record demonstrate composition of the county.

4. Witnesses ⇐335

In view of article restricting impeachment of one's own witness, defendant after cross-examination of defense witness by the State on matters assertedly foreign to direct examination was not entitled to impeach such witness by showing his prior convictions. Vernon's Ann.Texas C.C.P. art. 38.28.

5. Criminal Law ⇐986.6(3)

Proof of prior convictions of witness who was codefendant was not within right to present mitigating circumstances to jury at punishment stage. Vernon's Ann.Texas C.C.P. art. 37.071.

6. Criminal Law ⇐986.6(3)

Fact of conviction and decision of another jury of punishment appropriate for different murder, which did not occur prior to case at bar, were not relevant, and evidence of conviction and life sentence for other murder were properly excluded.

7. Homicide ⇐229

Evidence in homicide prosecution was sufficient to prove identity of deceased as that of person alleged in indictment.

8. Criminal Law ⇐1035(6)

Where no trial objections were made to alleged improper exclusion of prospective jurors in alleged violation of *Witherspoon* doctrine, nothing was presented for review.

9. Criminal Law ⇐854(1)
Jury ⇐148(1)

Trial judge in not administering oath to each individual juror as accepted and in not sequestering individual jurors after each was selected did not err but acted in compliance with procedures provided by statute. Vernon's Ann.Texas C.C.P. arts. 35.22, 35.22 comment, 35.23.

E. Brice Cunningham and Walter L. Irvin, Dallas, for appellant.

Henry Wade, Dist. Atty., R.K. Weaver, Kevin Byrne, Stewart C. Robinson, Jr. and John W. Booth, Asst. Dist. Attys., Dallas, Robert Huttash, State's Atty., and Alfred Walker, Asst. State's Atty., Austin, for the State.

Before the Court en banc.

OPINION

ODOM, Judge.

This is an appeal from a conviction for capital murder. Punishment is death, the jury having returned affirmative answers to the questions submitted under Art. 37.071, V.A.C.C.P.

[1, 2] In his first two grounds of error appellant contends it was error to admit his oral confession and keys found as a result of the confession. He argues these two grounds together, raising four contentions. Three of his arguments are based on Article 38.22, V.A.C.C.P., regarding statutory requirements for the admission of confessions. Two of those contentions are based on provisions of Art. 38.22 that were not in force at the time of the confession and therefore do not apply. See Acts 1977, 65th Leg., ch. 348, sec. 3, effective Aug. 29, 1977. No trial objection was made on the third contention now raised under Art. 38.22, so nothing is presented for review. In his remaining argument under these grounds of error he asserts the officer to whom appellant gave the oral statement was not aware of the fact that appellant had previously been given *Miranda* warnings by two other officers. The record contradicts appellant's assertion of fact. No error is presented. Also, see *Moon v. State*, Tex.Cr.App., 607 S.W.2d 569, 572, and *Maloy v. State*, Tex.Cr.App., 582 S.W.2d 125, 129. The first two grounds of error are without merit.

[3] The next five grounds of error are argued together by appellant and concern the composition of the grand jury and grand jury commissioners. In *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), the Supreme Court wrote:

> "... in order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs."

To show underrepresentation it is essential that the record demonstrate the composition of the county. See *Espinoza v. State*, Tex.Cr.App., 604 S.W.2d 908. Here no evidence on that point was presented. The grounds of error are without merit. Furthermore, in his argument under this ground of error appellant asserts none of the members of the grand jury that indicted him were of his race, but the record reflects that two of the twelve grand jurors were.

[4] Appellant argues grounds of error eight through fifteen together. These grounds all concern exclusion of evidence of prior convictions of the witness Earl Stanley Smith. Appellant and Smith together committed the double murder-robbery that resulted in this prosecution. Smith was called as a witness by the defense. On appeal appellant argues that the State cross-examined the witness on matters foreign to the direct examination, and this authorized him to impeach Smith by showing his prior convictions. He relies on Article 38.28, V.A.C.C.P., which provides:

> "A party may, when testimony of his own witness is injurious to his cause, attack the testimony in any other manner except by offering evidence of the witness' bad character."

In his argument appellant overlooks the restriction on impeachment under this article that prohibits showing bad character. Proof of prior convictions is a form of impeachment by showing bad character. See Ray, Law of Evidence, sections 644 et seq, especially section 648. This argument by appellant is without merit.

[5] He also contends proof of Smith's prior convictions should have been admitted

at the punishment stage as a mitigating circumstance under Art. 37.071, V.A.C.C.P. We do not see how the conviction and punishment of a *co-defendant* could mitigate *appellant's* culpability in the crime. Each defendant should be judged by his *own* conduct and participation and by his *own* circumstances. If evidence of a co-defendant's convictions and punishment were admissible, why not the convictions in all other capital murders and the punishment in those cases? We do not believe this is what the right to present mitigating circumstances to the jury was meant to include. The law contemplates evidence personal to the accused, not comparisons with the convictions and punishments of other defendants. Appellant does not contend he was precluded from showing the roles of Smith and himself in the criminal act. Grounds of error eight through fifteen are overruled.

[6] The next two grounds of error complain of exclusion of evidence of appellant's conviction and life sentence for another murder. He again argues the evidence was admissible under Art. 37.071, supra, and quotes from the opinions in *Jurek v. State*, Tex.Cr.App., 522 S.W.2d 934, and *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929, to the effect that the jury can consider the range and severity of prior criminal conduct of the accused and should have all relevant information before it. The fact of conviction and the decision of another jury of the punishment appropriate for a different murder are not evidence of appellant's conduct. If the conviction and punishment had occurred prior to the instant offense, they would be relevant to show a lack of rehabilitation, but that is not the situation here. Although appellant makes the assertion that this evidence "was relevant on all 3 [punishment stage] issues," he gives no reasons to illustrate this bare conclusion. We perceive no relevance under the facts of this case and overrule the grounds of error.

[7] In his eighteenth ground of error appellant challenges the sufficiency of the evidence to prove the identity of the deceased as the person alleged in the indictment. The following circumstances are sufficient to prove that fact: (1) the deceased, a woman, was last seen alive with a friend; a woman's body was found with the body of a man positively identified as the body of that friend; (2) clothing on the body was identified by members of the deceased's family as the clothing worn by her on the day of the murder; (3) appellant was seen driving the deceased's car between the time of the murder and his arrest, and he admitted taking the car from the person he killed; (4) appellant possessed a watch that appeared to be the same as the one worn by the deceased, he admitted taking it from a person he murdered, and the body when found did not have a watch. The ground of error is overruled.

[8] The next three grounds of error assert certain prospective jurors were improperly excluded in violation of the Witherspoon[1] doctrine. Although the record reveals the trial court committed no error in this regard, we decline to give a detailed report on our examination of the record because no trial objections were made, so nothing is presented for review. *Bass v. State*, Tex.Cr.App., 622 S.W.2d 101, 109.

[9] The last two grounds of error complain of the failure to administer an oath to each individual juror as accepted and of the failure to sequester the individual jurors after each was selected. The trial court did not err, but to the contrary acted in compliance with the procedures provided in Arts. 35.22 and 35.23, V.A.C.C.P. See commentary to Art. 35.22, V.A.C.C.P., by Hon. John F. Onion, Jr. The grounds of error are without merit.

The judgment is affirmed.

TEAGUE and MILLER, JJ., concur in result.

ONION, P.J., and CLINTON, J., dissent.

1. *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776.

83-5965

Office-Supreme Court, U.S.
FILED
DEC 19 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No._____

MICHAEL WAYNE EVANS,

Petitioner,

versus

THE STATE OF TEXAS,

Respondent.

MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

COMES NOW the Petitioner in the above captioned matter and moves this Court for an order allowing him leave to proceed Forma Pauperis pursuant to 28 USC, Sections 19, 15 and Rule 53, Rules of the Supreme Court. As basis for such order, Petitioner would show the Court as follows:

I.

Petitioner is a person who has no income. He cannot individually pay the costs necessary to proceed before this Court, nor give security therefor.

II.

Specifically, Petitioner cannot afford nor give security for the costs of printing requirements otherwise required by the Rules of this Court.

III.

Petitioner is a voluntary party before the Court and would in due course file his Application for a Writ of Certiorari.

IV.

Petitioner has been continuously since July 1977 incarcerated in the Dallas County Jail and the Texas Department of Corrections, the Ellis Unit, respectively. Petitioner is a person with no income and has not previously filed a Petition or a Motion to Proceed in Forma Pauperis.

V.

Petitioner has no financial support or the potential therefor from his parents. His mother and father are unable to assist him.

W H E R E F O R E, PREMISES CONSIDERED, Petitioner respectfully prays that this Court consider the foregoing and enter an order granting him leave to proceed before the Court in Forma Pauperis pursuant to 28 USC, Section 1915 and Rule 53, Rules of the Supreme Court.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

83-5965

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IN THE

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October Term, 1983

No._____

MICHAEL WAYNE EVANS,

Petitioner,

versus

THE STATE OF TEXAS,

Respondent

A F F I D A V I T

THE STATE OF TEXAS I
COUNTY OF WALKER I KNOW ALL MEN BY THESE PRESENTS:

BEFORE ME, the undersigned authority came this date MICHAEL WAYNE EVANS, and having first been duly sworn and deposed did say that:

"I am MICHAEL WAYNE EVANS, the Petitioner in the action below before this Court. I have been advised by my attorneys that I will be seeking from this Court review by virtue of a Petition for Writ of Certiorari. I am further advised by my attorneys of the costs of the proceedings before this Court and of its printing requirements.

"I am a person of no financial means. In that I am currently incarcerated in the Ellis Unit of the

Texas Department of Corrections. I have no income consequently no funds of which to defray the costs of these proceedings and defray the costs of printing. I have no savings accounts, bonds or stock, or other property sufficient to afford the costs of this proceeding, should printing be required. My parents cannot afford to assist me with the cost. I have insufficient funds and/or property to pay the costs of this proceeding or furnish security therefor. Petitioner will file his Application for a Writ of Certiorari and do so in good faith. I respectfully requests of this Court that it allow Petitioner Leave to Proceed in Forma Pauperis for the foregoing reasons."

MICHAEL WAYNE EVANS, Affiant

SWORN TO AND SUBSCRIBED BEFORE ME, this the 30th day of November, 1983, to certify which witness my hand and seal of office.

NOTARY PUBLIC IN AND FOR
Walker COUNTY, T E X A S

MY COMMISSION EXPIRES:
12-10 86

MARY L. McELIS
NOTARY PUBLIC
WALKER COUNTY, TEXAS
COMMISSION EXPIRES 12/10/86

CERTIFICATE OF SERVICE

The Undersigned Attorney for Petitioner, MICHAEL WAYNE EVANS, certifies that a copy of his Petitioner's Motion For Leave To Proceed in Forma Pauperis has on the 19th day of December, 1983, been mailed to the following parties: Attorney General Jim Mattox, Supreme Court Building, P. O. Box 12548, Austin, Texas, certified return receipt requested; Assistant District Attorney, Appellate Section, District Attorney's Office, New Dallas County Courthouse Building, Dallas, Texas 75202; Honorable Thomas B. Thorpe, Judge 203rd Judicial District Court, New Dallas County Courthouse, Dallas, Texas 75202, by depositing a copy of same to each of them, by United States Mail, postage prepaid, on this the 19th day of December, 1983.

Walter L. Irvin

WALTER L.IRVIN

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NO. 83-5965

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

MICHAEL WAYNE EVANS,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THIS COURT SHOULD CONSIDER GROUNDS NOT PRESENTED TO THE COURT BELOW?

II. WHETHER THE STATE SYSTEMATICALLY EXCLUDED BLACKS, MEXICAN-AMERICANS AND PERSONS BETWEEN THE AGES OF EIGHTEEN AND TWENTY-ONE FROM SERVING AS GRAND JURY COMMISSIONERS?

III. WHETHER THE STATE SYSTEMATICALLY EXCLUDED BLACKS FROM SERVING ON THE GRAND JURY?

IV. WHETHER THE TRIAL COURT ERRED IN REFUSING TO PERMIT PETITIONER TO IMPEACH HIS OWN WITNESS WITH EVIDENCE OF BAD CHARACTER?

V. WHETHER THE TRIAL COURT'S DENIAL OF PETITIONER'S REQUEST AT THE PUNISHMENT PHASE TO PUT INTO EVIDENCE THE FACT THAT PETITIONER WAS CONVICTED AND SENTENCED TO LIFE IMPRISONMENT IN A SEPARATE CAPITAL MURDER CHARGE PRECLUDED PETITIONER FROM PRESENTING MITIGATING EVIDENCE?

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the court of Criminal Appeals of Texas, which is reported at 656 S.W.2d 65 (Tex.Crim.App. 1983)(en banc), is reproduced in Appendix A to the Petition for Writ of Certiorari. The Texas Court of Criminal Appeals denied the Motion for leave to file Petitioner's Motion for Rehearing without written order on September 21, 1983.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

The record reflects that Petitioner was indicted on August 22, 1977, in Dallas County, Texas, for the murder of Elvira Guerrero, while in the course of committing and attempting to commit the offense of robbery. Petitioner was initially tried on October of 1977 in the 103rd Judicial District Court of Dallas County, Texas and was found guilty of the capital offense. His conviction was reversed by the Texas Court of Criminal Appeals on September 10, 1980, and the cause remanded for new trial.

Petitioner's new trial began on September 28, 1981, and on October 1, 1981, the jury found Petitioner guilty of the capital offense. On October 8, 1981, after a punishment hearing, the jury answered affirmatively the special issues submitted pursuant to Article 37.071, V.A.C.C.P. Accordingly, punishment was assessed at death. Petitioner appealed this conviction and sentence to the Court of Criminal Appeals of Texas, which, on May 25, 1983, affirmed the conviction and sentence. Rehearing was denied on September 21, 1983.

SUMMARY OF ARGUMENT

There are no special or important reasons to review this case. The issues presented involve only the application of well settled constitutional principles to the facts involved herein. This Court is without jurisdiction to consider Petitioner's proportionality claim and his claim that the death penalty as applied discriminates on the basis of race because Petitioner has not presented the precise issues raised herein to the Texas Court of Criminal Appeals.

Petitioner's claims of intentional and systematic exclusion of Blacks, Mexican-Americans and persons between the ages of eighteen and twenty-one should be denied as only questions of evidence and factual findings are involved. The court below, correctly applying the test established by this Court in Castenada v. Partida, 430 U.S. 482 (1977), held that Petitioner failed to present sufficient evidence to demonstrate a prima facie case of underrepresentation.

Petitioner has failed to demonstrate a claim of constitutional dimension with his contentions that the trial court committed fundamental error in refusing to permit Petitioner to impeach his own witness with evidence of prior convictions. Texas law expressly excludes the use of bad character to impeach a party's own witness. Further, the facts and circumstances of the present case are significantly different than those presented to this Court in Chambers v. Mississippi, 410 U.S. 284 (1973).

Petitioner's claim that he was prevented from presenting mitigating evidence relevant to the special issues is wholly conclusory. The court below correctly held that Petitioner failed to demonstrate the exclusion of any relevant mitigating evidence at the punishment phase.

This Court had held that proportionality review is not constitutionally required in every death penalty case. In so doing, the Court expressly reaffirmed the Texas capital sentencing statute. Further, Petitioner's conclusory allegations fail to demonstrate any discrimination on the basis of race in the application of the death penalty in Texas.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefore. Petitioner has advanced no special or important reason in this case and none exists. Further, this case presents only the question of whether well-settled constitutional principles were correctly applied to the facts of this case. Thus, no important question of law is presented here.

II. THIS COURT IS WITHOUT JURISDICTION TO CONSIDER PETITIONER'S PROPORTIONALITY CLAIM AND HIS CLAIM THAT THE DEATH PENALTY AS APPLIED DISCRIMINATES ON ACCOUNT OF RACE BECAUSE THEY WERE NOT PRESENTED TO THE TEXAS COURT OF CRIMINAL APPEALS.

The cases are legion that this Court will not decide issues raised for the first time on petition for writ of certiorari or on appeal, and that the Court will not decide federal questions not raised and decided in the court blow. E.g., Illinois v. Gates, 103 S.Ct. 2317, 2321-23 (1983); Tacon v. Arizona, 410 U.S. 351, 352 (1973); Hill v. California, 401 U.S. 797, 805-06 (1971); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long-standing nature of the rule: "[I]n Crowell v. Randell, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344 (1809), and come to the conclusion that the Judiciary Act of 1789, 20, Section 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391." Cardinale v. Louisiana, 394 U.S. at 439. To properly invoke the jurisdiction

of the Court, it is crucial that the federal question not only be raised in the state proceedings, but that it be raised at the proper point. Beck v. Washington, 369 U.S. 541, 550 (1962); Godchaux Co., Inc. v. Estopinal, 251 U.S. 179, 181 (1919).

Petitioner's contentions that the Texas death penalty scheme is constitutionally invalid because it fails to provide a procedures for proportionality review and that the death penalty as applied in Texas discriminates on the basis of race were not raised in the court below. Thus, Petitioner's claims were not adequately presented to and decided by the state court below. Respondent submits that in view of Petitioner's failure to sufficiently and properly raise the issues presented here below, the failure of the state court to pass on these issues, the desirability of giving the state the first opportunity to address the issues, the application for certiorari should be denied for want of jurisdiction. Cardinale v. Louisiana, 394 U.S. at 439.

In any event, this Court held in Pulley v. Harris, 52 L.W. 414 (Jan. 23, 1984), that the comparative proportionality review is not constitutionally required in every case in which the death penalty is imposed and the defendant requests it. Further, Petitioner's allegations that the death penalty as applied in Texas discriminates on account of race because more Blacks and Hispanics are prosecuted and convicted of capital murder than are Caucasians are self-serving, conclusory and totally unsupported by any specific allegations.

III. REVIEW OF PETITIONER'S CLAIMS OF INTENTIONAL AND SYSTEMATIC EXCLUSION OF BLACKS, MEXICAN-AMERICANS, AND PERSONS BETWEEN THE AGES OF EIGHTEEN AND TWENTY-ONE SHOULD BE DENIED AS ONLY QUESTIONS OF EVIDENCE AND FACTUAL FINDINGS ARE INVOLVED.

The questions presented for review relative to Petitioner's claims that Blacks, Mexican-Americans, and persons between the ages of eighteen and twenty-one were intentionally and systematically excluded from serving on grand juries and from

serving as grand jury commissioners do not present substantial questions worthy of this Court's review. In Castenada v. Partida, 430 U.S. 482, 494 (1977), this Court established the test by which to determine whether an equal protection violation has occurred in the context of grand jury selection:

> [I]n order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs. The first step is to establish that the group is one that is a recognizable, distinct class, singled out for for different treatment under the laws, as written or as applied. Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time.

(Citations omitted). Applying the Castenada test, the Texas Court of Criminal Appeals held that Petitioner failed to present sufficient evidence to prove underrepresentation. Evans v. State, 625 S.W.2d at 66. The issues presented involve nothing more than the state appellate court's application of well-established principles to a unique factual situation.

IV. PETITIONER'S CLAIM THAT THE TRIAL COURT ERRED IN REFUSING TO PERMIT PETITIONER TO IMPEACH HIS OWN WITNESS FAILS TO STATE A CLAIM OF CONSTITUTIONAL DIMENSION.

Petitioner contends that he was denied a fundamentally fair trial by the trial court's refusal at the guilt-innocence stage to permit defense counsel to impeach a defense witness by offering evidence of the witness' prior convictions. He argues that he had a right to such evidence under Texas law and that the court's refusal to permit such evidence violated the principles as established by this Court in Chambers v. Mississippi, 410 U.S. 284 (1973). Petitioner's claims are wholly without merit.

The court below expressly found that proof of prior convictions is a form of impeachment by showing bad character. Texas law expressly excludes evidence of a witness' bad character for impeachment. Evans v. State, 625 S.W.2d at 66. See Tex. Code Crim. Proc. Ann. art. 38.28 (Vernon).

Further, the facts and circumstances of the present case are significantly different from those presented in Chambers. Chambers involved the exclusion of hearsay evidence critical to the accused's defense and bearing substantial assurance of trustworthiness. As Petitioner concedes in his petition, the evidence excluded by the trial court was useful "to establish or disestablish [sic] credibility" of the defense witness. Respondent submits that Petitioner's claim of constitutional error is meritless.

V. THE COURT BELOW CORRECTLY DETERMINED THAT PETITIONER WAS NOT PRECLUDED FROM PRESENTING RELEVANT MITIGATING EVIDENCE AT THE PUNISHMENT PHASE.

In Lockett v. Ohio, 438 U.S. 586 (1978), this Court held that the sentencer in a capital case must be permitted to consider any relevant mitigating factors. In so holding, however, this Court expressly noted that "nothing in [the court's] opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." 438 U.S. at 605 n.12.

Following the Lockett guidelines, the court below held that Petitioner failed to demonstrate, other than by bare conclusion, that evidence of his conviction and life sentence for a separate and distinct murder, was relevant mitigating evidence. In so holding the court below stated:

> The next two grounds of error complain of exclusion of evidence of appellant's conviction and life sentence for another murder. He again argues the evidence was admissible under Art. 37.0171, supra, and quotes from the opinion in Jurek v. State,

> 522 S.W.2d 934, and Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929, to the effect that the jury can consider the range and severity of prior criminal conduct of the accused and should have all relevant information before it. The fact of conviction and the decision of another jury of the punishment appropriate for a different murder are not evidence of appellant's conduct. If the conviction and punishment had occurred prior to the instant offense, they would be relevant to show a lack of rehabilitation, but that is not the situation here. Although appellant makes the assertion that this evidence "was relevant on all 3 [punishment stage] issues," he gives no reasons to illustrate this bare conclusion. We perceive no relevance under the facts of this case and overrule the grounds of error.

Evans v. State, 625 S.W.2d at 67.

Petitioner again presents nothing more than his bare conclusion that the evidence "was relevant to all three (3) [punishment] issues." His claim that he was precluded from presenting relevant mitigating evidence is thus, not worthy of this Court's review. Compare, Eddings v. Oklahoma, 455 U.S. 104 (1982).

CONCLUSION

For these reasons, Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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